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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-4227

ROBERT H. PATTON, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Robert H. Patton, appeals through counsel two September 3, 2015, Board of Veterans' Appeals (Board) decisions that found (1) no presence of clear and unmistakable error (CUE) in a November 17, 2005, Board decision; and (2) that evidence submitted by the appellant was not new and material and did not warrant a reopening of his claim of entitlement to service-connected benefits. Record (R.) at 2-20. The appellant argues that the Board failed (1) to provide an adequate statement of reasons and bases for its finding that his new evidence regarding continuity of symptomatology was not material; (2) to adequately address his contentions regarding his CUE complaint; and (3) to dismiss his CUE motion, due to the motion lacking the requisite specificity. Appellant's Brief at 1-12. For the following reasons, the Court will vacate both of the Board's September 2015 decisions, dismiss without prejudice the appellant's CUE motion, and remand the matter of whether new and material evidence was submitted.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and specified relations of veterans, is consistent with congressional intent

as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792)("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Navy from March 1963 to March 1965. R. at 490 (DD Form 214). In August 1964, the appellant was treated for lower back pain resulting from an in-service injury. R. at 360. The appellant was again treated for this same condition in September 1964 and February 1965. R. at 360, 380.

The appellant reinjured his back in 1972 and 1973. R. at 1185. The appellant submitted a claim for benefits based on service connection for his back disorder in 1977, but was denied. R. at 1581. The appellant did not appeal this decision and it became final. The appellant submitted an application to reopen his claim in January 2001. In November 2005, the Board reopened the claim and denied it on the merits, finding that the appellant's back injury was not service connected. R. at 623-40.

In September 2010, the appellant filed a statement regarding the Board's November 2005 denial, requesting that VA "reverse all denials of service connection for a back condition. " R. at 612. In support of this request, the appellant stated that "several CUE's have been made." R. at 612. In his statement, the appellant alleged that

[t]he Board [in November 2005] failed to recognize that Mr. Patton within 9 months from discharge injured his back in December 1966 as described as a diagnosis of lumbosacral strain, the same condition that Mr. Patton was treated for in 1965, so in fact Mr. Patton sought and was treated for a back condition within one year of release from active duty.

R. at 612. VA interpreted this statement as (1) a request for the reopening of the appellant's case, and (2) a motion for CUE in the November 2005 Board decision. *See* R. at 2-20.

In September 2015, the Board issued two decisions on the same day, ruling against the appellant. R. at 2-20. In the first decision, the Board found that "[t]he arguments by the Veteran

allege CUE to the requisite specificity," concluding that

[t]he Veteran's argument is equivalent to an argument that the November 2005 Board decision improperly weighed and evaluated the evidence of record. The Veteran avers that the Board "failed to recognize" that his injury in December 1966 was the "same condition" that he was treated for in service in 1965; therefore, he argues that the Board should have found that his back disability had its onset in service.

R. at 8. The Board then found no CUE in the November 2005 decision, stating that denial of the appellant's back disorder claim was not clearly and unmistakably erroneous. R. at 2. In the second decision, the Board stated that the new evidence that the appellant submitted since the last final denial was not new and material. R. at 14-5. This appeal ensued.

The Court determines that the Board clearly erred in finding that "the arguments advanced by the Veteran alleged CUE to the requisite specificity." R. at 8, *See* 38 C.F.R. § 20.1404(b) (2016); 38 C.F.R. § 20.1409(b) (stating that CUE motions must explain clearly and specifically the alleged CUE of fact or law in the Board decision and why the result would have been different if not for the error; non-specific allegations are insufficient; dismissals for insufficient pleading are to be dismissed without prejudice). The Board's construction of the appellant's CUE motion evidences that the appellant's motion for revision lacked specificity.

Although the Board construed the motion as disagreeing with how the evidence was weighed in 2005, the Court believes the appellant was actually arguing that he was entitled to presumptive service connection due to his belief that he had a chronic condition that manifested within one year of discharge. R. at 612; *see also* R. 612. Because the appellant's statement was ambiguous as to the alleged CUE in the November 2005, the Board clearly erred in finding that this motion contained the requisite specificity. The appellant failed to explain with any specificity exactly what these errors are, as required by § 20.1404(b). *See* R. at 612. Although not specifically pled by the appellant, the Board extrapolated that his CUE motion centered around the Board's failure in November 2005 "to recognize that . . . within nine months from service discharge [the appellant], injured his back in December 1966 (lumbosacral strain), and that this was the same condition that he was treated for in service in 1965." R. at 6. Dismissal by the Board without prejudice is required for the appellant to have an opportunity to re-file his motion for CUE and, specifically, to plead his CUE theory. *See* 38 C.F.R. § 20.1409(b).

Additionally, the Court agrees with the appellant's contention that the Board provided an inadequate statement of reasons or bases for finding his new evidence not material. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (detailing that, in each of its decisions, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court). The appellant's claim for benefits for his low back pain was previously denied because the Board deemed that his back injury did not occur in service. *See* R. at 19. The appellant submitted a September 2014 physician's note that stated that the appellant has been suffering from lower back pain since service and that this pain has continued throughout his lifetime. R. at 175. Therefore, the Court will remand the matter for the Board to provide an adequate statement of reasons or bases for why it found the appellant's 2014 physician's note not material.

This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. (1792) ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

For the foregoing reasons, and on review of the record, the Board's September 3, 2015, decision regarding the appellant's CUE motion is VACATED, and the Board is instructed to DISMISS WITHOUT PREJUDICE the appellant's CUE motion. The Board's September 3, 2015, decision denying reopening of the appellant's claim for benefits for low back pain is VACATED, and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

Kenneth H. Dojaquez, Esq.

VA General Counsel (027)